

Consolidated Under No. 79222-4

(Court of Appeals No. 55256-2-I)

(Court of Appeals No. 57725-5-I)

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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KEVIN J. LOCKE and TORI LOCKE,

Respondents,

v.

THE CITY OF SEATTLE,

Petitioner.

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MARGARET A. LINDELL, Personal Representative for the  
Estate of GARY R. LINDELL, deceased,

Respondent,

v.

THE CITY OF SEATTLE,

Petitioner.

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**RESPONDENT LINDELL'S BRIEF**

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## I. INTRODUCTION

Respondent Margaret Lindell, as the Personal Representative of the Estate of Gary Lindell, is the plaintiff in a wrongful death action filed against the City of Seattle. In said litigation it is alleged that her husband, Officer Gary Lindell suffered a severe and disabling head injury when he fell from a SPD mounted patrol horse during a training exercise in the City's paddock. Several months before Officer Lindell's fall, the soft layer of protective material (hogs fuel) was scraped off of the surface of the paddock into a large pile and never replaced. Thus when Officer Lindell fell off of the SPD mounted patrol horse he was riding at the time of the training exercise his head struck hardpan causing his fractured skull and brain injury. One of the sequela of his brain injury was a severe seizure disorder. Officer Lindell died as a result of a seizure on March 13, 2002. Gary's widow, Margaret Lindell, pursues this wrongful death action on behalf of herself, her children and her husband's Estate pursuant to RCW 4.20 et seq.

The Petitioner City of Seattle moved for Summary Judgment to Dismiss. This motion was denied by the Honorable Mary Yu of the King County Superior Court on January 6, 2006. Upon motion of the Petitioner, the issues of sovereign immunity and the constitutionality of RCW 41.26.270 and .281 were certified pursuant to RAP 2.3(b)(4) by

Judge Yu on January 9, 2006. On July 5, 2006 Commissioner Mary Neel denied the City's Motion for Discretionary Review in Division I of the Court of Appeals. A three-judge panel denied the City's motion to modify the order denying discretionary review on September 29, 2006.

On October 26, 2006 City filed a motion for discretionary review with the Supreme Court of the Court of Appeal's denial of its motion for discretionary review. On January 3, 2007 the Petitioner's Motion for Discretionary Review was granted "only on the issues of sovereignty and the State Constitution's Privileges and Immunities clause" and was consolidated under Supreme Court No. 79222-4, *Locke v. City of Seattle*.

## **II. ISSUES PRESENTED**

1. Does the LEOFF statute, RCW 41.26 et seq and, specifically, RCW 41.26.281 unconstitutionally violate Article I, Section 12 of the Washington State Constitution?

2. Does the LEOFF statute violate sovereign immunity, despite the waiver of sovereign immunity set forth in RCW 4.92.010 and/or RCW 41.26.281?

### III. ARGUMENT

#### A. **PETITIONER HAS FAILED TO ESTABLISH THAT THE LEOFF STATUTE IS UNCONSTITUTIONAL PURSUANT TO ARTICLE I, SECTION 12 OF THE WASHINGTON STATE CONSTITUTION**

##### 1. **Petitioner's Burden of Proof**

Whenever a party challenges the constitutionality of a statute enacted by the Legislature, said party is required to establish the unconstitutionality of the statute beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998). Every constitutional analysis of a statute must commence with the proposition that statutes are presumed to be constitutional and all doubts should be resolved in favor of constitutionality. *State ex rel. Smilanich v. McCollum*, 62 Wn.2d 602, 606, 384 P.2d 358 (1963). Respondent will address the Petitioner's constitutional arguments both under an equal protection analysis and an independent state constitutional analysis.

##### 2. **Equal Protection Analysis**

###### a. **Rational Relationship**

Our Supreme Court has consistently interpreted the equal protection clause in Article I, Section 12 of the Washington State Constitution to be substantially similar to the equal protection clause in the

Federal Constitution and "treated them accordingly." *Seeley v. State*, 132 Wn.2d 776, 788, 940 P.2d 604 (1997). Under the equal protection clause, persons similarly situated with respect to the purposes of the law shall receive like treatment. *In re Woods*, 154 Wn.2d 400, 412, 114 P.3d 607 (2005).

There is no claim by the Petitioner that the City is a member of a suspect class. Thus, the "rational relationship" test applies. *Gossett v. Farmers Insurance Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). The rational relationship test is described as follows:

**"Under the rational relationship test, a classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives and the burden is on the challenger to show that the classification is purely arbitrary. A classification will be upheld against an equal protection challenge if there is any conceivable set of facts that would provide a rational basis for the classification."** *Gossett v. Farmers Insurance Co.*, supra at p. 979. (Citations omitted, emphasis provided).

Thus, the standard is whether there is any conceivable set of facts that would provide a rational basis for the classification set forth in RCW 41.26.281 that provides police officers and firefighters with the right to pursue a claim for damages in excess over the amount received or receivable under RCW 41.26 if injury or death results from the intentional or negligent act or omission of his or her employer. In contrast is the language of RCW 51.24.020, applicable to employees other than police

officers and firefighters, which provides the right to pursue a claim for damages in excess of benefits paid or payable pursuant to RCW 51 for harm resulting from the "deliberate intention of his or her employer." RCW 51.24.020.

The issue is whether there is any rational basis for the classification. Our Court has specifically commented on this dichotomy in *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002). The Court held as follows:

"While the Industrial Insurance Act immunizes most employers from a job-related negligence suits, firefighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to collect both workers' compensation and bring job-related negligence suits against their employers. RCW 51.04.010, 41.26.281." *Hauber v. Yakima County*, supra at p. 660.

Our Court has also noted that RCW 41.26.281 was specifically enacted by the Washington State Legislature "to provide greater benefits to injured police officers and firefighters than they would receive under the workers' compensation system." *Fray v. Spokane County*, 134 Wn.2d 637, 643, 952 P.2d 601 (1998).

The Petitioner argues that there is no conceivable set of facts that could provide a rational basis for the statutory classification providing police officers and firefighters with the right to seek compensation beyond

benefits paid and payable when their employer intentionally or negligently causes harm, while providing other workers with the right to seek such compensation only when the employer intentionally harms the worker. The Petitioner argues that this Court's determination in *Hauber* that the "vital and dangerous nature" of the services provided by firefighters and police officers does not provide a "conceivable set of facts" that would provide the "rational basis" for this statutory classification. In support of this argument the Petitioner contends that there are other professions (i.e. logging) that are more dangerous than firefighting or law enforcement; therefore (according to the Petitioner) it has proven beyond a reasonable doubt that this statute is unconstitutional. This reasoning is flawed.

There is no suggestion under Washington law that the rational relationship test requires some sort of strict statistical analysis in order to support the classifications established by the Legislature. There is no question that the work performed by police officers and firefighters is hazardous. In addition, this Court pointed out that it is the "**vital** and dangerous nature" of the services that sets firefighters and police officers apart from other classifications of employees. *Hauber v. Yakima County*, supra at p. 660. Although there are certainly many occupations that are "dangerous" there is no question that law enforcement and firefighting are uniquely "vital" to the health and well-being of the citizens of our state. In

short, the Petitioner fails to carry its heavy burden of proof of establishing beyond a reasonable doubt that there is no rational basis whatsoever for this statutory classification.

Secondly, the Petitioner's suggestion that this statute is unconstitutional because any Workmen's Compensation system must provide "immunity" in exchange for the burden of funding this system is patently incorrect. RCW 51, Washington's Industrial Insurance Act, does not provide complete immunity for employers. It specifically provides that employers remain liable for harm to employees caused by their intentional acts. This Court has interpreted the phrase "deliberate intention" in RCW 51.24.020 to include circumstances in which the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. *Birklid v. The Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995). In *Birklid* employees alleged that they suffered injuries from exposure to chemicals in the workplace.

Therefore, the suggestion that other employers have been granted immunity from suit in exchange for making contributions to the State Industrial Insurance fund is incorrect. The difference is that all employers remain liable for injuries caused by intentional harm, as interpreted by our Court in *Birklid* and its progeny, and employers of police officers and

firefighters remain liable for injuries caused by intentional harm and negligence.

**b. Minimal Scrutiny**

The minimal scrutiny analysis has been provided under Article I, Section 12 in several cases by this Court when there is no suggestion that a fundamental right or suspect class is implicated by the statute in question. See, *Paulson v. Pierce County*, 99 Wn.2d 645, 664 P.2d 1202 (1983); *Yakima County Deputy Sheriff's Association v. Board of Commissioners*, 92 Wn.2d 831, 601 P.2d 936 (1979). See also, *Locke v. City of Seattle*, 133 Wn. App. 696, 137 P.3d 52 (2006); *Campos v. Department of Labor & Industries*, 75 Wn. App. 379, 880 P.2d 543 (1994).

Minimal scrutiny analysis requires that the court engage in the following inquiries:

1. Does the classification apply alike to all members within a designated class?
2. Does some basis in reality exist for reasonably distinguishing between those within and without the designated class?
3. Does the challenged classification have any rational relation to the purposes of the challenged statute?

As summarized by our Court of Appeals in *Locke*:

"[D]oes the difference in treatment between those within and without the designated class serve the purposes

intended by the legislation?" *Locke v. City of Seattle*, supra at p. 707.

First, there is no question that the classification applies equally to all members within a designated class of firefighters and police officers as set forth by RCW 41.26.281. The fact that the State has pulled the Washington State Patrol out of LEOFF under RCW 43 may have some relevance to an interpretation of that statute, but has no impact on RCW 41.26.281. Secondly, as noted by this Court in *Hauber* and *Fray* there is some basis in reality for distinguishing between firefighters and police officers, and other employees, on the basis that it is well understood that the work performed by firefighters and police officers is both vital to society as well as inherently hazardous.

Finally, the challenged classification has a rational relation to the purposes of the challenged statute. This last inquiry is essentially summarized in *Locke* as part of the determination to assess whether the differences in treatment between those within and without the class serve the overall purpose of the legislation. The Petitioner argues that the differences in treatment between those within and without the designated class render RCW 41.26.281 unconstitutional. However, if the Petitioner's argument had merit then the entire LEOFF act would be unconstitutional, because it sets forth a retirement and disability system applicable only to

police officers and firefighters. There are numerous benefits provided by LEOFF for police officers and firefighters that are not available to other employees under the Industrial Insurance Act. For example, LEOFF provides for death benefits for firefighters and police officers families even when a firefighter or police officer suffers fatal injuries in a "non-duty" incident. See, RCW 41.26.161. No comparable benefit is provided to workers covered by RCW 51 et seq. Under the Petitioner's analysis, RCW 41.26.161 and any other section within LEOFF that differs at all from the language within the Industrial Insurance Act would be unconstitutional simply because LEOFF applies only to police officers and firefighters. The Petitioner's analysis is overbroad and nonsensical.

### **3. Independent State Analysis of Article I, Section 12**

The Petitioner never presented any argument to the trial court nor within its Motion for Discretionary Review before the Court of Appeals suggesting that Washington's version of the equal protection clause may be construed as providing greater or different protection than the equal protection clause of the 14<sup>th</sup> Amendment of the Federal Constitution. This argument was first raised in the Petitioner's Motion to Modify the Ruling of the Court Commissioner denying discretionary review. In addition, at no time in the subject motion or in any other pleadings filed in the

Supreme Court or in the Court of Appeals has the Petitioner analyzed the six factors relevant in determining whether the Washington State Constitution extends broader rights to citizens than the Federal Constitution, as required by this Court in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Nonetheless, even if one was to evaluate this case on the basis of a state constitutional analysis, the Petitioner fails to carry its heavy burden of establishing that this statute is unconstitutional. The Petitioner argues that the statute grants positive favoritism to a "select few;" apparently referring to all of the firemen and policemen throughout the state. It cites in support of its contention the case of *Alton v. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964). In *Alton* special legislation had been passed to benefit a single corporation by waiving the applicable Statute of Limitations in order to allow it to pursue litigation against the State. As noted by this Court, our Constitution reflects the populist suspicion at the time of enactment of political influence exercised by those with large concentrations of wealth. *Fire Protection District v. City of Moses Lake*, 145 Wn.2d 702, 728, 42 P.3d 394 (2002). That concern could be manifested by the special legislation in *Alton* designed to benefit a single corporation. Application of the privileges and immunities clause resulted

in a determination by this Court in *Alton* that such special legislation is unconstitutional.

However, providing firemen and police officers with the ability to pursue compensation for injuries caused as a result of their municipal employer's negligence, less an offset for all benefits paid and to be paid under LEOFF, does not benefit a "select few" and passes constitutional muster under the standard of review set forth in *Fire Protection District v. City of Moses Lake*, supra. In order for the statute to be constitutional, it only needs to be established that "the legislation applies alike to all persons within a designated class and there is a reasonable ground for distinguishing between those who fall within the class and those who do not." *Fire Protection District v. City of Moses Lake*, supra @ p. 731; *United Parcel Service v. Department of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984).

This Court has repeatedly expressed the "reasonable grounds" for providing firefighters and police officers with the right to seek compensation for damages caused by their municipal employers' negligence, less an offset for benefits paid and to be paid under LEOFF:

While the Industrial Insurance Act immunizes most employers from job-related negligence suits, firefighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring

job-related negligence suits against their employers."  
*Hauber v. Yakima County*, 147 Wn.2d 655, 660, 56 P.3d  
559 (2002); *Locke v. City of Seattle*, supra @ p. 708.

In addition, our Courts have noted that one of the purposes and effects of RCW 41.26.281 is that, "By exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety." *Hansen v. City of Everett*, 93 Wn. App. 921, 926, 971 P.2d 111 (1999). Safety is particularly important to individuals who serve the public by being routinely confronted with dangerous situations on the job.

In short, even if the Petitioner had the right to have this statute constitutionally analyzed on the basis of its new argument that it grants a "Privilege and Immunity" to a "select few" in violation of Art. 1 §12, this Court has clearly expressed "reasonable grounds" in distinguishing between classifications as defined in this statute.

Finally, the Petitioner's suggestion that the statutory offset provided to municipalities from any damages awarded to injured firefighters or police officers, or their families, is "illusory" and simply avoids "double recovery" is incorrect. This argument was expressly rejected by the Court of Appeals in *Locke v. City of Seattle*, supra, and in *Hansen v. City of Everett*, 93 Wn. App. 921, 971 P.2d 111 (1999), and implicitly rejected by this Court in *Gillis v. City of Walla Walla*, 94 Wn.2d

193, 616 P.2d 625 (1980), *overruled on other grounds, Flanagan v. Department of Labor and Industries*, 123 Wn.2d 418, 423, 869 P.2d 14 (1994).

Petitioner will receive an offset for 100% of all benefits paid and payable under LEOFF, even if the plaintiff's economic damages, as awarded by the jury, are substantially less than those benefits, or the net recovery to the plaintiff is greatly diminished by comparative fault or fault on the part of non-party, at-fault entities. For example, even if the benefits paid under LEOFF greatly exceed the past economic damages awarded by the jury, the Petitioner would receive an offset for 100% of those benefits it has already paid from the total damages (non-economic as well as economic) awarded at trial. Similarly, Petitioner would have the right to offset the value of all future benefits payable, even in this figure is greater than the jury's award of future economic damages. The net result is that the offsets could completely consume the verdict, depending upon the extent of the jury's award for non-economic damages, in addition to past and future economic damages. Thus, the offset provided to the municipal employer under RCW 41.26.281 of all benefits paid and payable results in treatment of the municipality is far more favorable than is generally received by most subrogors in tort litigation. *Locke v. City of Seattle*, *supra*.

Finally, the Petitioner's contention that RCW 41.26.281 completely eviscerates RCW 41.26.270 and is therefore inconsistent with that statute is incorrect. RCW 41.26.270 sets forth the general principle that, under LEOFF, the municipality is immune from liability for claims by its employee firefighters and police officers, although it specifically provides that this statute is subject to RCW 41.26.281. The Petitioner suggests that RCW 41.26.281 completely eliminates said immunity. This assertion is wrong. RCW 41.26.281 does not eliminate immunity; rather, it makes the municipal employer liable for damages for injuries caused by intentional harm or negligence. Thus, municipal employers of firefighters and police officers remain immune from any claims for compensation that do not require proof of intentional harm or negligence.

The Petitioner suggests that any remaining immunity is illusory. Again, the Petitioner's suggestion is incorrect. In addition to the example set forth by the Court of Appeals in *Locke* concerning potential product liability claims that may be based upon strict liability, municipalities would also be immune with respect to claims based upon statutory strict liability for injuries caused by dog bites. Many if not all police agencies have canine units. Under Washington law, the owner of a dog that bites another individual may be strictly liable for the damages suffered by the

individual. RCW 16.08.040. See also, *Hansen v. Sife*, 34 Wn. App. 888, 664 P.2d 1200 985 (1983). The statute in question reads as follows:

"The owner of any dog which shall bite any person while such person is in or on a public place or lawfully in or on a private place including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness."  
RCW 16.08.040.

It is certainly foreseeable that police dogs have bitten and will bite police officers in the future. Although the injured officer would have a claim for Worker's Compensation benefits under LEOFF, he or she would not have a right to pursue a claim for damages under RCW 16.08.040. RCW 41.26.281 requires that the injured officer prove that his or her municipal employer intentionally or negligently caused his or her harm. Thus, municipalities remain immune from strict liability to its firefighters and police officers for injuries caused by its police dogs. Given the fact that canine units generally utilize powerful and genetically aggressive breeds, this immunity is not an insignificant statutory benefit.

Even under an independent State analysis of the privileges and immunities clause, RCW 41.26.281 passes Constitutional muster.

**B. RCW 41.26.281 DOES NOT VIOLATE SOVEREIGN IMMUNITY**

It is well understood that the Legislature has the right to waive sovereign immunity. This Court has already held that the waiver of sovereign immunity set forth in RCW 4.96.010 applies to claims made under RCW 41.26.280 (the predecessor to RCW 41.26.281). *Taylor v. Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977). Reversal on the basis of the Petitioner's sovereign immunity argument would require that *Taylor* be overruled.

Although this Respondent does not believe that there is any distinction between those police officers who are covered by LEOFF I and those operating under LEOFF II, Petitioner's argument is inapplicable to Respondent Lindell because Officer Lindell was covered by LEOFF I.

In addition to the analysis set forth by the Court of Appeals in *Locke* and the arguments set forth by Respondents Locke in their Supplemental Brief, an alternative way to analyze this issue is to simply look at the Legislature's actions as set forth in the statute in question. It goes without saying that the Legislature has the right to enact legislation that waives sovereign immunity. RCW 4.96.010 provides a general waiver of sovereign immunity and it is the language of this statute upon which the Petitioner has exclusively focused its briefing. However, given the fact that the Legislature can waive sovereign immunity there is no question that it can be waived by way of other statutes for specific

situations, such as for claims made by police officers and firefighters for injuries caused by their employers' negligence. In short, the language of RCW 41.26.281 itself waives any sovereign immunity that may have existed with respect to such claims.

Cases cited by the Petitioner support the Respondent's analysis. For example in *State v. Thiessen*, 88 Wn. App. 827, 946 P.2d 1207 (1997) this Court noted that RCW 4.56.115 "contains a limited waiver of immunity for interest." *Id.* at p. 829. That statute provides that judgments founded on the tortious conduct of the State of Washington or of the political subdivisions shall bear interest until such time as the judgment is satisfied. The Court of Appeals recognized that the Legislature, through RCW 4.56.115, had waived its sovereign immunity with respect to interest on judgments founded on the tortious conduct of a governmental entity. Similarly, given the Legislature's specific statutory waiver of sovereign immunity by way of RCW 41.26.281, there no need to independently analyze whether there is an "analogous private right" as argued via the Petitioner's interpretation of RCW 4.96.010.

This Court's decision in *Edgar v. State*, 92 Wn.2d 217, 595P.2d 534 (1979) is also instructive. The plaintiff in *Edgar* sought damages against the State for the mental distress and humiliation suffered as a result of alleged intimidation, harassment and threats imposed by his superior

officers during his service in the National Guard. This Court held that National Guard service is analogous to military service and that the plaintiff's rights to compensation from the State are limited to the statutory framework applicable to National Guard service, RCW 38 et seq.

Relevant to our discussion is the reference by this Court in *Edgar* to the right of individuals to pursue a claim for damages against a municipality for damages pursuant to 42 USC §1983. This federal statute provides the basis for individuals to seek compensation from municipalities for the violation of his or her constitutional rights. See, *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Although not directly on point, the well understood principle that Congress can pass Legislation that effectively waives or abrogates sovereign immunity with respect to the subject of that Legislation is analogous to our Legislature's authority to pass legislation that results in a waiver of sovereign immunity. The Legislature has specifically waived sovereign immunity insofar as it would arguably preclude liability for damages caused by the intentional or negligent acts of the municipality that result in injury to police officers or firefighters. Any other reading of RCW 41.26.281 is nonsensical and would violate the principle that statutes should not be construed so as to nullify, void or render meaningless any portion of said law. *Taylor v. Redmond*, supra at p. 319; *Locke v. City of Seattle*, supra at p. 704.

The Petitioner's attempt to ignore the Legislature's waiver of sovereign immunity inherent in RCW 41.26.281 is responsible for the Gordian knot Petitioner creates with its argument. The Petitioner contends that because RCW 51.24.020 provides employees with the right to seek damages in excess of Worker's Compensation benefits only for harm caused by the intentional acts of its employers, while RCW 41.26.281 provides police officers and firefighters with the right to seek such damages for harm caused by the intentional or negligent acts of its municipal employers, that there is no analogous private right to compensation and, therefore, there has been no waiver of sovereign immunity pursuant to RCW 4.96.010. Under the Petitioner's analysis, our Legislature would be prohibited from statutorily providing a right to compensation from a governmental entity without providing a similar right for compensation from private entities. There is no support for such an analysis. Clearly, the Legislature specifically waived whatever sovereign immunity may have existed for municipalities when it enacted legislation that specifically provides police officers and firefighters with the right to seek compensation for harm caused by the intentional acts and negligence of their municipal employers. RCW 41.26.281.

